



**County Government of Tana River & another v Hiribae; KCB
Bank Kenya Ltd (Garnishee) (Miscellaneous Civil Application
34 of 2023) [2023] KEHC 23997 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 34 OF 2023
SM GITHINJI, J
OCTOBER 24, 2023**

BETWEEN

COUNTY GOVERNMENT OF TANA RIVER 1ST APPLICANT

GAFI HIRIBAE 2ND APPLICANT

AND

GAWANA SAID HIRIBAE RESPONDENT

AND

KCB BANK KENYA LTD GARNISHEE

RULING

1. For determination is the respondent's preliminary objection dated March 30, 2023 raised on the following grounds;
 - a. That the matter having arisen from the Garsen subordinate court, this suit/appeal/application ought to be filed before the Garsen High Court and therefore the Malindi High Court lacks jurisdiction.
 - b. The suit is bad in law, incompetent and defective.
 - c. The pleadings have been instituted by strangers.
2. The preliminary objection was canvassed by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issue for determination is whether the preliminary objection is merited and whether the firm of Kilonzo Aziz & Co. Advocates is properly on record.



3. The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v. Safaricom Ltd & anor* [2020] eKLR as follows:

“

- “(9) This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

- [10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of article 163 (7) of the *Constitution* of Kenya 2010.

- (11) In case cited by the 1st Respondent, *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ. after considering various holdings of the Supreme Court of Kenya on question of preliminary objection held as follows:

“We quickly turn to the question whether we have before us a preliminary objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



4. In *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

5. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the entire suit.
6. The respondent raises the issue of jurisdiction herein. It is his position that the orders being stayed vide the instant application were granted by the Garsen lower court and therefore any challenge ought to have been filed in Garsen High Court. As regards the question of jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

“ A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

7. Further, in *Orange Democratic Movement v Yusuf Ali Mobamed & 5 others* [2018] eKLR, the Court of Appeal stated: -

(44) “.... a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...”

8. This application emanates from orders that were issued by Hon. Kadima in Garsen Law courts. There is a functional High court in Garsen where decisions impugned should have been challenged. If I were to agree with the applicant and allow the application proceed here in Malindi High Court, I would be setting a bad precedent in respect of Geographical jurisdiction. Further, it would be tantamount to this court rendering the Garsen High Court insignificant. There are no sufficient reasons as to why the application could not be filed at Garsen High Court of which is the right court of jurisdiction. In the



circumstance therefore, I find that this court lacks the Geographical jurisdiction to hear and determine the application.

9. On whether the firm of Kilonzo & Aziz Advocates is a stranger;

Order 9 Rule 5 of the *Civil Procedure Rules* states as follows:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

10. Order 9 Rule 9 of the *Civil Procedure Rules* states that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected unless by order of the court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

11. The firm of Kilonzo & Aziz Advocates filed an application dated 20/3/2023 seeking leave to come on record on behalf of the 1st applicant. The said application has no hearing date on the face of it. I have noted that when the matter was coming up for hearing of the decree holder’s application on 21/3/23, the firm of Osur Associates Advocates was on record for the 1st Applicant. It is clear there was no notice of change of advocates on record hence the firm of Kilonzo & Aziz Advocates failed to comply with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* by either filing a consent between themselves and the firm of Osur & Associates and then file a notice of change of Advocates and serve it upon the respondent and the Advocate of the applicant on record. They should as well have sought leave to come on record by filing an application which should have been fixed for hearing before the hearing of the respondent’s application. On 21/3/23 it is the firm of Osur & Associates that was on record.

12. In sum therefore, it is my finding that the firm of Kilonzo & Aziz Advocates is not properly on record as they did not follow the right procedure required by law. In so finding, I associate myself with the holding in *John Langat v Kipkemoi Terer* [2013] eKLR that:

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.” No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

13. Arising from the above analysis it is vivid that Kilonzo & Aziz Advocates should not have filed the current application since they are strangers. They had not obtained orders of the court to come on record or entered into a consent to that effect. The upshot is that the application dated 22/3/2023 fails for want of merit and the same is hereby dismissed with costs. This finding binds related matters No.20



of 2023, 25 of 2023, 26 of 2023, 27 of 2023, 28 of 2023, 29 of 2023, 30 of 2023, 31 of 2023, 32 of 2023, 33 of 2023 and 35 of 2023.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 24TH DAY OF OCTOBER, 2023.

.....

S.M.GITHINJI

JUDGE

In the Presence of; -

1. Ms Osewe for the Interested party, KCB.
2. Ms Oloo holding brief for Mr Kilonzo for the Applicant
3. Wambua Kilonzo is present for the Respondent

